In The

Supreme Court of the United States

October Term, 1974

No. 73-1377

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK, ET AL.

No. 73-1378

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

CAMPAIGN CLEAN WATER, INC.

On Writs of Certiorari to the United States Courts of Appeals for the District of Columbia and the Fourth Circuits

BRIEF OF THE COMMONWEALTH OF VIRGINIA AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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OPINIONS BELOW

The opinion of the court of appeals in *City of New York*, No. 73-1377 (Pet. App. A, pp. 1A-34A), is reported at 494 F.2d 1033. The opinion of the district court (Pet. App. E, pp. 59A-78A) is reported at 358 F. Supp. 669.

The opinion of the court of appeals in *Campaign Clean Water*, No. 73-1378 (Pet. App. B, pp. 35A-53A), is re-

ported at 489 F.2d 492. The opinion of the district court (Pet. App. F, pp. 79A-100A) is reported at 361 F. Supp. 689.

QUESTIONS PRESENTED

1. The question presented in *City of New York* is whether Sections 205(a) and 207 of the Water Pollution Control Act Amendments of 1972 authorize the Administrator, acting at the direction of the President, to control the rate of spending under the program by allotting less than the full amounts authorized by the Congress.

2. The question presented in *Campaign Clean Water* is whether the court of appeals, upon recognizing that the question whether the Administrator has discretion to allot less than the amounts authorized was no longer an issue in case, should have directed the district court to dismiss the complaint instead of remanding the case for a hearing *de novo* to determine whether the Administrator abused his discretion in making the particular allotments.

INTEREST OF THE AMICUS

The interest of the Commonwealth of Virginia lies in the interpretation of §§ 205(a) and 207 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 *et seq.*, in the context of appellant's assertion that he is authorized, pursuant to those sections, to refuse to allot, by specified deadlines, the maximum amount of funds authorized to be appropriated in each of fiscal years 1973 and 1974.

All publicly-owned treatment plants within the Commonwealth are required to comply, by July 1, 1977, with applicable effluent limitations established pursuant to the Act.

The refusal of the appellant to allot, and make available for obligation, all funds authorized will compound the serious shortfall of federal funds needed by political subdivisions of the Commonwealth to effect compliance with the requirements of the Act.

ARGUMENT

I.

Sovereign Immunity Is No Bar To A Suit Which Challenges An Action Taken Pursuant To A Power If The Exercise Of That Power Is Not Discretionary Or If The Exercise Of That Power Is In Excess Of Statutory Authority.

The sovereign immunity test has been firmly established by this Court. This test provides that if a statute confers a power, the exercise of which is not within the discretion of the Administrator, sovereign immunity will not bar a suit which seeks to challenge the validity of the action taken pursuant to that power. This test further provides that, if a statute confers a power, the exercise of which is within the discretion of the Administrator, the general rule is that sovereign immunity will bar a suit, to which the United States has not consented or otherwise waived its immunity, which seeks to challenge the validity of the action taken pursuant to that power. Notwithstanding this general rule, sovereign immunity will not bar such a suit if:

1. The exercise of the power allegedly exceeds statutory authority; or

2. The exercise of the power is unconstitutional, even though that exercise is within the scope of statutory authority. *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Malone* v. *Bowdoin*, 369 U.S. 643 (1962).

For the reasons developed *infra*, it is clear that sovereign immunity does not bar a suit against the Administrator challenging the validity of his refusal to allot initially all sums authorized to be appropriated pursuant to §§ 205(a) and 207 of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter "the Act"), 33 U.S.C. §§ 1285(a), 1287 (Supp. II, 1972). This conclusion must follow because the duty of the Administrator to allot all funds authorized is nondiscretionary. Even assuming, *arguendo*, that this duty is discretionary, the action taken is reviewable by this Court, the power must not be exercised so as to frustrate the attainment of the goals of the Act, and the power has been exercised in excess of statutory authority.

II.

The Administrator Has No Discretion To Refuse To Allot Initially All Sums Authorized To Be Appropriated Under The Act.

A.

The Intent Of The Act Requires That All Sums Authorized To Be Appropriated Be Allotted Initially.

The analysis of the question presented will be clearer if the legislative goals and statutory mechanism set up under the Act are briefly outlined.

The Act sets forth, *inter alia*, the following national goals and policy: that the discharge of pollutants be eliminated by 1985; that an interim goal of water quality be achieved by July 1, 1983; and, that federal financial assistance be provided to construct publicly-owned waste treatment works. See § 101(a).

To implement these goals and policies, the Congress prohibited the discharge of any pollutant by any person except as in compliance with, *inter alia*, §§ 301(b)(1)(B), 301(b)(1)(C), and 402. See § 301(a). Publicly-owned treatment works must provide, by July 1, 1977, secondary treatment [§ 301(b)(1)(B)], or higher levels of treatment required to implement water quality standards [§ 301(b)(1)(C)], whichever is more stringent. These deadlines for compliance with technological limitations are required to be incorporated into individual discharge permits issued pursuant to § 402.

Title II of the Act sets forth the mechanism by which the United States provides grant funds to underwrite 75 percent of the costs of compliance with the foregoing deadlines and limitations. The Administrator is authorized to make such grants. See § 201(g)(1). The Act provides an authorization not to exceed $18 billion for fiscal years 1973, 1974, and 1975. See § 207. The Administrator is required to allot sums authorized to be appropriated to the states in accordance with their needs. See § 205(a). The approval of the Administrator of plans, specifications, and estimates for a treatment works project constitutes a contractual obligation of the United States to pay 75 percent of the costs of such construction. See §§ 203(a) and 202(a). Sums allotted but not obligated within a prescribed time must be reallotted to the states. See § 205(b). A state may utilize future allotments under certain conditions if it wishes to get a headstart towards compliance with the statutory deadlines: See § 206(f)(1).

The Administrator is compelled to enforce compliance with deadlines and technological limitations, and he has available to him a variety of remedies. Whenever a political subdivision of a state is a party to a suit brought by the Administrator, the state shall be joined as a party and shall be liable for the payment of any judgment, including the cost of compliance with applicable deadlines and limitations, to the extent that the political subdivision may not under state law raise the required revenues. See § 309. Citizens

may bring suit in federal court, regardless of the amount in controversy, to spur such enforcement by the Administrator.

The funding mechanism under the Act is a subject before this Court. The Commonwealth concurs with the court of appeals that the term "shall allot" in § 205(a) and the term concerning sums "not to exceed" in § 207 are not susceptible to a "plain meaning" analysis. *City of New York* v. *Train*, 494 F.2d 1033, 1039 (D.C. Cir. 1974). This Court must construe these provisions to discover their true intent. *Utah Junk Co.* v. *Porter*, 328 U.S. 39 (1946). This duty is clear where the language of the statute is of doubtful meaning. *Application of Martin*, 195 F.2d 303 (C.C.P.A.), *cert. denied*, 344 U.S. 824 (1952). In order to determine the true legislative intent, resort may be had to the legislative history of the Act. *United States* v. *Henning*, 344 U.S. 66 (1952); *Wilderness Society* v. *Morton*, 479 F.2d 842, 855 (D.C. Cir. 1973).

Congress manifested a clear intent to commit a total of $18 billion in federal grant funds to underwrite the federal share of the costs of constructing publicly-owned treatment works by the deadlines established in the Act. An analysis of the legislative history of the Act shows that the Congress first set the goals it wished to achieve. See "A Legislative History of the Water Pollution Control Act Amendments of 1972," Committee Print, Committee on Public Works, 93rd Cong., 1st Sess., January 1973, 3, 120, 164-65, 283, 894, 1535 (hereinafter cited as Legis. Hist.). Second, the Congress established the deadlines by which these goals would be achieved. *Id.* at 32, 254, 303-04, 963, 1608-09. Third, the Congress determined the cost of meeting these deadlines. *Id.* at 98-9, 100, 115, 120, 164-65, 185, 189-90, 243, 266. Fourth, the Congress provided corresponding authorizations of funds to underwrite these costs. *Id.* at 26, 164-65, 189-90, 243, 266, 298, 1452, 1591-92. During the protracted consideration of the bills which resulted in the Act, the deadlines were correspondingly extended to accommodate the required lead time for construction (*Id.* at 1209), and the authorizations were raised to correspond to higher Administration estimates of the costs of compliance with the deadlines. *Id.* at 164-65, 189-90, 266. These conclusions are consistent with the interpretation by the court of appeals of the overall intent of the Act. *City of New York* v. *Train*, *supra*, at 1039-42.

B.

THE HARSHA AMENDMENTS TO §§ 205(a) AND 207 DID NOT AUTHORIZE THE ADMINISTRATOR TO REFUSE TO ALLOT INITIALLY ALL FUNDS AUTHORIZED.

Prior to the Harsha Amendments, § 207 unequivocally authorized a total of $18 billion for the three year period ending on June 30, 1975. Section 205(a) required the Administrator to allot all sums authorized by specified deadlines. It is clear that, in view of the deadlines for compliance established under the Act [§ 301(b)(1)] and the lead time required for construction (Legis. Hist. 1209), the Congress intended that all funds authorized would be obligated by the Administrator prior to June 30, 1975. See S. Rep. No. 414, 92nd Cong., 1st Sess. 35 (1971), Legis. Hist. 1453.

The Harsha Amendments inserted the term "not to exceed" in § 207 and deleted the word "all" from § 205(a). The intended result of these changes is fully discussed by the court of appeals in its opinion. That court found that the intended result of the amendments was to provide the Administrator with flexibility to control the rate of spend-

ing, *i.e.*, the rate at which obligations would be made, rather than the discretion to refuse to allot and to obligate the entire amount authorized by § 207. *City of New York* v. *Train, supra* at 1042-46. The Commonwealth concurs in this interpretation because it is consistent with the expressed intent of Congress to effect compliance with the deadlines of the Act and to minimize the fiscal impact of expenditures made pursuant to the Act. The Congress could not have meant to give the Administrator the discretion to allot less than the full amounts authorized because, with such discretion, the Administrator could control the total amount available to be spent, and, in turn, could frustrate the attainment of the objectives of the Act.

Since the Congress did not grant to the Administrator the discretion to refuse to allot initially the full amounts authorized, such refusal is in excess of statutory authority, and, accordingly, sovereign immunity is no bar to a suit alleging the invalidity of that action. *Malone* v. *Bowdoin, supra.*

III.

Even Assuming, Arguendo, That The Administrator Has The Discretion To Refuse To Allot The Full Amounts Authorized, The Exercise Of That Discretionary Authority Is Subject To Judicial Review And Must Not Frustrate The Goals Of The Act. If The Action Complained Of Produces Such Frustration, Sovereign Immunity Will Not Bar Legal Action.

A.

THE ACTION OF THE ADMINISTRATOR IS SUBJECT TO JUDICIAL REVIEW.

It is settled that a court may inquire into the exercise by an administrator of discretion conferred by statute to determine whether or not that discretion was exercised in such

a manner as to make impossible the attainment of the objectives of the statute. *Kendall* v. *United States,* 37 U.S. (12 Pet.) 524 (1838); *National Automatic Laundry and Cleaning Council* v. *Shultz,* 443 F.2d 689 (D.C. Cir. 1971); *Campaign Clean Water* v. *Train,* 489 F.2d 492, 498 (4th Cir. 1974).

B.

THE ADMINISTRATOR'S REFUSAL TO ALLOT ALL SUMS AUTHORIZED HAS CAUSED, OR GREATLY CONTRIBUTED TO, THE INABILITY OF VIRGINIA TO COMPLY WITH THE OBJECTIVES OF THE ACT.

All publicly-owned treatment works are required to comply by July 1, 1977, with effluent limitations based on secondary treatment or with limitations required to implement applicable water quality standards. The Administrator estimated that $424.4 million in federal funds would be required to underwrite the federal share of the costs of compliance with these limitations and deadlines. S. Rep. No. 92-1236, 92nd Cong., 2d Sess. 15 (1972), Legis. Hist. 296.

The Congress clearly intended to provide the authorized funds at an early time in the period required for compliance. This intent has been discussed *supra,* and is evidenced by congressional recognition of (1) the lead time required to plan, design, and construct treatment works (Legis. Hist. 1209); (2) the advanced construction provisions of § 206 (f)(1); and, (3) the notation with approval of phased funding (Legis. Hist. 294).

On November 22, 1972, the Administrator refused to allot to Virginia $174.9 million that should have been allotted and made available for obligation during fiscal years 1973 and 1974. In taking this action, the Administrator allotted to Virginia only $145.6 million. The Commonwealth im-

mediately proceeded in good faith to submit to the Administrator grant applications within the limits set by this allotment. The full amount allotted for these two fiscal years has not yet been fully obligated. This is not the result, however, of a paucity of qualified projects in the Commonwealth. Rather, since the federal share of total costs of applications submitted was equal to the available allotment, and since every application has not yet been approved, the full allotment has not yet been obligated.

The Commonwealth now finds herself in dire straits. Her present needs for federal funds, as determined by the Administrator, are $1.008 billion. These funds are required to underwrite the federal share of the costs of compliance with the effluent limitations contained in § 301(b) of the Act. These increased needs are due to, *inter alia*, more refined cost estimates, new requirements established by the Administrator, and inflation.

In view of the shortfall in required federal funds and the 30-45 month lead time required for construction, it is now clear to the Commonwealth that all of her publicly-owned treatment works will not meet the July 1, 1977, deadline. Accordingly, the Commonwealth has filed suit [*State Water Control Board* v. *Train*, Civil No. 74-0328-R (E.D. Va., filed July 19, 1974)] in which she seeks relief from enforcement of the July 1, 1977, deadline. The Commonwealth has requested the court to declare that, for any publicly-owned sewage treatment plant, compliance with applicable limitations shall not be required until federal funds are made available in an amount sufficient to underwrite 75 percent of the costs of compliance with the Act, and until a reasonable time has been allowed for completion of construction. The Commonwealth does not seek a blanket extension of this deadline; rather, she seeks to have the

deadline set on a case-by-case basis, and she has suggested a means under the Act whereby the court can readily supervise compliance with revised deadlines.

It must be emphasized that, notwithstanding refined needs estimates and inflation, the impoundment of more than one-half of the funds authorized for fiscal years 1973 and 1974 has caused, or contributed greatly to, the impossibility of compliance by Virginia's political subdivisions with the July 1, 1977, deadline. This impoundment has frustrated the clear legislative objectives of the Act. Such frustration is an abuse of discretion which is open to judicial review, and on account of which judicial relief should be afforded. Further, since the action taken is an abuse of discretion, a suit challenging the validity of that action is not barred by sovereign immunity. *Malone* v. *Bowdoin*, *supra*.

IV.

CONCLUSION

It is clear from an examination of the legislative history of the Act that the Congress did not intend to confer upon the Administrator the discretion to refuse to allot the full sums authorized to be appropriated pursuant to § 207 of the Act. Accordingly, the decision of the court of appeals in *City of New York* v. *Train* should be affirmed.

Even assuming, *arguendo*, that such discretion does exist, the Administrator must not exercise that discretion in such a way as to frustrate the attainment of the objectives of the Act. The court may review an action which results from an alleged abuse of discretion to determine whether the action taken would frustrate the Act's objectives. If the court determines that these objectives are frustrated by the action complained of, sovereign immunity will not bar a suit

challenging the validity of that action. The decision of the court of appeals in *Campaign Clean Water* v. *Train* should be affirmed.

Respectfully submitted,

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